

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROZANNE M. SILER
Claimant

VS.

512 U.S.D.
Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,002,036

ORDER

Claimant appeals the August 19, 2009, Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts (ALJ). Claimant was ordered to follow the changes in psychiatric treatment consistent with the recommendations of psychiatrist Patrick L. Hughes, M.D.

Claimant appeared by her attorney, James E. Martin of Overland Park, Kansas. Respondent appeared by its attorney, Frederick J. Greenbaum of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 10, 2004, with attachments; the transcript of Motion For Penalties Hearing held November 29, 2004, with attachments; the transcript of Preliminary Hearing held March 31, 2005, with attachments; the transcript of Preliminary Hearing held May 25, 2006, with attachments; the transcript of Settlement Hearing held September 6, 2007, with attachments; the transcript of Preliminary Hearing held August 17, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

Claimant raises the following issues in her Request For Review filed with the Appeals Board (Board):

- "1. Whether the administrative law judge had the authority to proceed following the filing of an Application for Preliminary Hearing filed by respondent to terminate or amend medical care following the entry of an Award herein;

- “2. Whether the administrative law judge exceeded her authority by directing a board certified psychologist to provide medical care dictated by another physician not associated with that psychologist;
- “3. Whether the decision of the administrative law judge is contrary to the weight of the credible evidence.”¹

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should remain in full force and effect and the appeal filed by claimant should be dismissed.

Claimant was employed by respondent on August 30, 2001, as a teacher. On that date, she was assisting children, who were getting on a bus, during a thunderstorm, when she was struck by lightning. Claimant has been provided with extensive medical and psychological treatment since the date of accident. The claim came on for settlement hearing on September 6, 2007. At that time the parties entered into a running award with it being agreed that the issue of future medical care was to remain open. As part of the settlement, Blake Wendelburg, M.D., was recognized as the authorized treating physician, including any referrals he may make. It was noted at the settlement hearing that referrals by Dr. Wendelburg had been made to Ravindran Sabapathy, Psy.D., a licensed clinical psychologist, and Scott Ashcraft, M.D., both from the Center for Pain Medicine with the Shawnee Mission Medical Center. Claimant came under the care of Dr. Sabapathy on October 28, 2002. At that time, she was diagnosed with post-traumatic stress disorder, major depressive disorder and chronic pain. It was recommended that claimant be treated with psychotherapy to manage the posttraumatic stress symptoms, and also with pain therapy and biofeedback.

In a September 8, 2003, report, Dr. Sabapathy noted claimant's gains in her overall functioning. Her symptoms of anxiety, depression and post-traumatic stress were significantly reduced. Pain management remained as a part of the treatment plan.

Claimant was examined by licensed psychologist and clinical neuropsychologist Terrie L. Price, Ph.D., on September 9, 2002. Claimant's history did identify the electric shock incident with significant pain. However, significant issues with regard to depression or anxiety were not identified in the multiple tests performed on claimant. Pain disorder was identified and noted to be associated with both psychological factors and claimant's general medical condition. A course of behavioral pain management was recommended. However, extensive therapy was not suggested.

¹ Request for Review at 1-2.

Claimant was also examined at the referral of respondent by licensed psychologist Kathleen J. Keenan, Ph.D., on August 8, 2003. Claimant displayed pain in her right thumb, right great toe, right arm, neck and shoulders. She also noted pain in her entire right side whenever it rained. Claimant again underwent a series of psychological tests. Claimant was diagnosed with a histrionic personality which relies on minimization, denial and repression to deal with stress or conflict. Claimant was identified as tending to develop physical symptoms when under stress. Her complaints were not consistent with a high voltage electrical injury. Also, it was noted that there was no evidence of entry or exit wounds from the lightning strike. It was recommended that claimant not be provided behavioral pain management, as her test results indicated that claimant has little motivation to change her circumstance.

Claimant has continued to treat with Dr. Sabapathy for her psychological needs and with ongoing pain management since 2002. In a report dated March 1, 2007, Dr. Sabapathy noted claimant continued with both physical and psychological symptoms with the pain symptoms continuing to interfere with her ability to function on a daily basis, although some improvement was noted.

Claimant was referred by respondent to psychiatrist Patrick L. Hughes, M.D., for a psychiatric evaluation on February 24, 2009. Dr. Hughes was provided extensive medical and psychological reports, including the results of the multitude of tests performed on claimant over the years. Claimant reported severe and disabling levels of pain from the initial lightning strike. However, Dr. Hughes noted a lack of evidence of neurological/neuronal injury on both a PET scan and a SPECT scan of the brain, as might occur from exposure to electricity. Claimant continued to display severe and frequent disabling levels of physical pain despite extensive treatment, including physical therapy, multiple injections and a variety of pain medications. Dr. Hughes noted claimant's recent indication of an extreme dependence on Dr. Sabapathy and claimant's concern about "losing" him as a therapist. Dr. Hughes made note of claimant's very extensive psychotherapy and the fact that she had regressed on a functional basis.

During his examination of claimant, Dr. Hughes noted no outward signs of psychiatric distress. Claimant was diagnosed with a phobia for thunderstorms, pain disorder with both medical and psychological factors, opioid dependence and a histrionic personality disorder. Dr. Hughes found claimant to greatly embellish her histrionic personality disorder and found a "need" to continue in what Dr. Hughes described as a "gratifying, long term psychotherapy with Dr. Sabapathy (upon whom she is clearly quite dependent at this point)."² Dr. Hughes recommended eight to ten sessions of "desensitization" techniques for the thunderstorm phobia. However, he found long-term psychotherapy to be fruitless and possibly counter therapeutic for a patient with a histrionic personality disorder. After the eight "desensitization" sessions above discussed, claimant

² Dr. Hughes' February 24, 2009, report at 5.

was recommended to undergo three “termination of therapy” sessions with Dr. Sabapathy, given claimant’s now significant dependence on the doctor. Any need for further long-term therapy with Dr. Sabapathy beyond that recommended is not attributed in any medically credible way to the psychiatric effects of the August 2001 lightning strike while working for respondent.³

In a report dated August 6, 2009, Dr. Sabapathy noted claimant’s ongoing post-traumatic stress disorder and continued depression. He recommended claimant continue with regular and consistent psychological care. On August 12, 2009, claimant filed an Application For Post Award Medical (form K-WC E-4). The decision of the ALJ granting respondent’s request for a change in claimant’s psychiatric treatment was entered on August 19, 2009.

PRINCIPLES OF LAW AND ANALYSIS

Claimant argues that the ALJ inappropriately allowed this matter to proceed after respondent filed an Application For Preliminary Hearing (E-3) because it was a post-award proceeding. Claimant contends that respondent should have been required to file an Application For Review and Modification under K.S.A. 44-528, arguing that a post-award preliminary hearing is not appropriate. However, in this instance, respondent is not requesting a change in the final Award as noted in the September 6, 2007, settlement. Here, claimant was being provided psychological and medical care pursuant to the original settlement, and has requested additional post-award neurological and neurosurgical treatment with the filing of the Application For Post Award Medical (form K-WC E-4). Respondent has requested a change in the post-award medical and psychological treatment which is being administered to claimant pursuant to the original settlement.

The use of a preliminary hearing procedure in a post-award situation has been allowed by the Kansas Court of Appeals. In *Bryant*,⁴ the Court was asked if a preliminary hearing order issued by an administrative law judge pursuant to K.S.A. 44-534a could be reviewed by the Board. The Court determined that, as the preliminary order had been issued after the final award, review by the Board was appropriate. Rather than prohibiting the use of a K.S.A. 44-534a hearing, post award, the case merely explained the proper procedure to be followed on appeal when a preliminary hearing procedure was utilized, post award.

³ P.H. Trans. (Aug. 17, 2009), Resp. Ex. A.

⁴ *Bryant v. U.S.D. No. 259*, 26 Kan. App. 2d. 435, 992 P.2d 808 (1999).

The purpose of a preliminary hearing is to make a summary determination whether the claimant should be receiving temporary total compensation and/or medical treatment under the Kansas Workers Compensation Act (Act).⁵ Here, the question is the ongoing need for medical and psychiatric treatment for claimant stemming from the lightning incident on August 30, 2001. Therefore, the use of a preliminary hearing in this instance for that purpose would be proper.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

The question of whether respondent is entitled to a change in the ongoing medical and psychiatric treatment ordered under the original settlement award is not one listed as jurisdictional under K.S.A. 44-534a. However, the Board must also determine whether an administrative law judge properly determined the issue at hand.

The Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.⁷

This claimant has undergone medical and psychiatric treatment from 2002 to the present with what appears to be no improvement. In fact, claimant appears to be worse than at the time of the original injury. The evaluations provided by Dr. Keener and Dr. Price not only failed to recommend long-term psychological treatment, it was actually recommended against. The recent report from Dr. Hughes recommended a change in the ongoing care for claimant and noted the development of a potentially disturbing relationship between claimant and her current psychologist. The ALJ determined that the

⁵ *Quant v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149 (2008); *Shain v. Boeing Military Airplanes*, 22 Kan. App. 2d 913, 924 P.2d 1280 (1996).

⁶ K.S.A. 44-534a(a)(2).

⁷ K.S.A. 2001 Supp. 44-551(2)(A).

regime recommended by Dr. Hughes was appropriate as claimant had received little long-term benefit from the current treatment. This finding is well within the jurisdiction and authority of the ALJ at a preliminary hearing. As the ALJ did not exceed her jurisdiction and authority at the preliminary hearing, a review of this decision would not be within the Board's jurisdiction on an appeal of a preliminary hearing Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The preliminary hearing procedure utilized by the ALJ in this instance is appropriate. Additionally, the decision of the ALJ is within her jurisdiction and authority and, thus, not reviewable by the Board at this time. The Preliminary Decision of the ALJ remains in full force and effect and the appeal of claimant is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated August 19, 2009, remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December, 2009.

HONORABLE GARY M. KORTE

c: James E. Martin, Attorney for Claimant
Frederick J. Greenbaum, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge

⁸ K.S.A. 44-534a.